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No. 05-

IN THE

Supreme Court of the United States

PAUL J. SCHLAFLIN,

Petitioner,

v.

RICHARD BOROWSKY, JAY F. FOX, PHILLIP CAMPO, STEVE MENNONA, GEORGE TRAMPLER, and ROBERT C. HOLMES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does qualified immunity protect police officers who effect an arrest pursuant to a State statute that violates axiomatic constitutional principles?

2. Once this Court reverses a criminal conviction because an *actus reus* was constitutionally protected, are police officers who make a subsequent arrest for an act of the same nature entitled to qualified immunity?

LIST OF PARTIES

Petitioner is Paul J. Schlaflin. Respondents are Richard Borowsky, Jay F. Fox, Phillip Campo, Steve Mennona, George Trampler, and Robert C. Holmes.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
TABLE OF APPENDICES	x
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE PETITION	6
A. Basing Qualified Immunity Upon a State Statute Despite Overwhelming Indicia of Its Unconsti-tutionality Unacceptably Enlarges the Scope of That Doctrine	6
B. The Third Circuit's Decision Inflicts a Deep Wound Upon the First Amendment	7
C. The Case Below Was Wrongly Decided	7

Contents

Page

1. Numerous Decisions of This Court Belie the Third Circuit's Holding That Applicable First Amendment Principles Were Less Than Clearly Defined 8

2. Five Other Courts of Appeals, and the Third Circuit Itself, Had Clearly Defined the Applicable Principles 11

3. Decisions by Numerous State Courts of Last Resort Clearly Defined the Applicable Law 12

4. New Jersey's Highest Court and the New Jersey Legislature Have Both Acknowledged the Constitutionally Protected Nature of Acts Such as Those for Which the Officers Arrested Petitioner 14

D. Public Officials, Civil Rights Plaintiffs, and the Courts Need Guidance Regarding the Extent to Which Principles Defined in a Criminal Case Become Clearly Defined for Qualified Immunity Purposes 16

E. Neither the Repeal of the Statute Under Which the Officers Arrested Petitioner Nor the Third Circuit's Designation of its Opinion as Non-Precedential Diminish the Need for Certiorari 16

CONCLUSION 17

TABLE OF CITED AUTHORITIES

CASES *Page*

Barrett v. Harrington,
130 F.3d 246 (6th Cir., 1997) 11

Blackhawk v. Commonwealth of Pennsylvania,
381 F.3d 202 (3rd Cir., 2004) 9

Burnham v. Ianni,
119 F.3d 668 (8th Cir., 1997) 11

Cannon v. City and County of Denver,
998 F.2d 867 (10th Cir., 1993) 12

Cohen v. California,
403 U.S. 15 (1971) 10

Douglas D, In re,
243 Wis.2d 204, 626 N.W.2d 725 (2001) 13

Eberhardt v. O'Malley,
17 F.3d 1023 (7th Cir., 1994) 11

Florida v. Rodriguez,
469 U.S. 1 (1984) 8

Grady v. El Paso Community College,
979 F.2d 1111 (5th Cir., 1992) 11

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 8

Cited Authorities

Page

Marbury v. Madison,
5 U.S. 137 (1803) 6

Police Department of the City of Chicago v. Mosley,
408 U.S. 92 (1972) 10

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992) 9, 11, 14, 16

Robinson v. Bibb,
840 F.2d 349 (6th Cir., 1988) 15

Rosenberger v. Rector and Visitors of University of Virginia,
515 U.S. 819 (1995) 10

Saxe v. State College Area School District,
240 F.3d 200 (3rd Cir., 2001) 12

State v. Hoffman,
149 N.J. 564, 695 A.2d 236 (1997) 15

State v. L.C.,
283 N.J. Super. 441, 662 A.2d 577 (App. Div., 1995), *certif. den.*, 143 N.J. 325, 670 A.2d 1066 (1996) 15

State v. Ramsey,
311 S.Ct. 555, 430 S.E.2d 511 (1993) 12

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Page

State v. Sheldon,
332 Md. 45, 629 A.2d 753 (1993) 13

State v. Talley,
122 Wash.2d 192, 858 P.2d 217 (1993) 13

State v. Vawter,
136 N.J. 56, 642 A.2d 349 (1994) 14, 15, 16

Texas v. Johnson,
491 U.S. 397 (1989) 10

Village of Skokie v. National Socialist Party of America,
69 Ill.2d 605, 373 N.E.2d 21 (1978) 13

Virginia v. Black,
538 U.S. 343 (2003) 10

CONSTITUTIONAL PROVISION

U.S. Const., 1st Amendment ..... *passim*

STATUTES CITED

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 5

28 U.S.C. § 1343 5

42 U.S.C. § 1983 ..... 1, 5, 11, 16

Cited Authorities

Page

Act of August 14, 1995,
1995 N.J.Laws, ch. 211, § 4 ..... 4, 15

Act of January 11, 2002,
2001 N.J.Laws, ch. 443 15

Act of September 10, 1981,
1981 N.J.Laws, ch. 282, §1 4

N.J.S. 2C:16-1 15

N.J.S. 2C:16-1a 2, 16

N.J.S. 2C:16-1a(1) 16

N.J.S. 2C:33-4 ..... 2, 3

N.J.S. 2C:33-4d 6, 8, 15

N.J.S. 2C:33-10 ..... 4, 14, 15, 16

Wash.Rev.Code 9A.36.080(2)(b) 13

Cited Authorities

Page

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Associated Press,
3rd Circuit: Man arrested for racist slur can't sue police, http://www.firstamendmentcenter.org/news.aspx?id=15114 7

Saphire, Richard B.,
Qualified Immunity in Section 1983 Cases and the Role of State Decisional Law, 35 Ariz.L.Rev. 621 (1983) 15

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Third Circuit Filed April 12, 2005 ..... 1a

Appendix B — Judgment Of The United States Court Of Appeals For The Third Circuit Dated April 12, 2005 ..... 7a

Appendix C — Memorandum And Order Of The United States District Court For The District Of New Jersey Dated June 7, 2004 ..... 9a

Appendix D — Order Of The United States Court Of Appeals For The Third Circuit Denying Petition For Rehearing Dated May 23, 2005 ..... 12a

PETITION FOR A WRIT OF CERTIORARI

Paul J. Schlaflin respectfully petitions for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The decision of the Third Circuit is reported at 128 Fed.Appx. 258 (App. 1a). The unpublished decision of the district court granting summary judgment in favor of Respondents was issued on June 7, 2004 (App. 9a).

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was filed on April 12, 2005 (App. 7a). An order denying rehearing and denying rehearing *en banc* was entered on May 23, 2005 (App. 12a). This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Third Circuit by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech[.]"

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of

> the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

N.J.S. 2C:16-1a provides in pertinent part:

> Bias Intimidation. A person is guilty of the crime of bias intimidation if he commits, attempts to commit, conspires with another to commit, or threatens the immediate commission of an offense specified in . . . N.J.S. 2C:33-4 . . .
>
> (1) with purpose to intimidate an individual or group of individuals because of race, color, religion, gender, handicap, sexual orientation, or ethnicity; or
>
> (2) knowing that the conduct constituting the offense would cause an individual or group of individuals to be intimidated because of race, color, religion, gender, handicap, sexual orientation, or ethnicity; or
>
> (3) under circumstances that caused any victim of the underlying offense to be intimidated and the victim, considering the manner in which the offense was committed, reasonably believed either that (a) the offense was committed with a purpose to intimidate the victim or any person or entity in whose welfare the victim is interested because of race, color, religion, gender, handicap, sexual

orientation, or ethnicity, or (b) the victim or the victim's property was selected to be the target of the offense because of the victim's race, color, religion, gender, handicap, sexual orientation, or ethnicity.

N.J.S. 2C:33-4 Harass ment provided:

Except as provided in subsection d., a person commits a petty disorderly persons offense if, with purpose to harass another, he:

a. Makes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm;

b. Subjects another to striking, kicking, shoving, or other offensive touching or threatens to do so; or

c. Engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person.

A communication under subsection a. may be deemed to have been made either at the place where it originated or at the place where it was received.

d. [Repealed] A person commits a crime of the fourth degree if in committing an offense under

> this section, he acted, at least in part, with ill will, hatred or bias toward, and with purpose to intimidate, an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity.

N.J.S. 2C:33-10 (Act of September 10, 1981, 1981 N.J.Laws, ch. 282, § 1) [Superseded] provided:

> A person is guilty of crime of the third degree if he purposely, knowingly or recklessly puts or attempts to put another in fear of bodily violence by placing on public or private property a symbol, an object, a characterization, an appellation or graffiti that exposes another to threats of violence, contempt or ~~hatred~~ on the basis of race, color, creed or religion, including, but not limited to a burning cross or Nazi swastika. A person shall not be guilty of an attempt unless his actions cause a serious and imminent likelihood of causing fear of unlawful bodily violence.

N.J.S. 2C:33-10 (Act of August 14, 1995, 1995 N.J.Laws, ch. 211, § 4) provides in pertinent part:

> A person is guilty of a crime of the third degree if he purposely, knowingly or recklessly puts or attempts to put another in fear of bodily violence by placing on private property of another a symbol, an object, a characterization, an appellation or graffiti that exposes another to threats of violence. A person shall not be guilty of an attempt unless his actions cause a serious and imminent likelihood of causing fear of unlawful bodily violence.

STATEMENT OF THE CASE

This case arises out of the attacks on the World Trade Center and the Pentagon on September 11, 2001. In response to those attacks, Petitioner painted "Death to the Sand Niggers" on his truck. He then drove his truck into Marlboro, New Jersey, and parked (App. 2).

An observer called the police. Respondent officers arrived. They arrested Petitioner. Their sole reason for arresting him was the words that Petitioner had painted. They charged him with bias harassment, contrary to N.J.S. 2C:33-4d. They impounded his truck. They kept it for two and one-half months. As a condition for its release, they required Petitioner to remove what he had painted (App. 2).

In due course, the municipal court judge to whom the matter was assigned ruled that Petitioner's words constituted speech protected under the First Amendment. He found Petitioner not guilty (App. 2).

Petitioner filed a civil action against Respondent officers in the United States District Court for the District of New Jersey under 42 U.S.C. § 1983. He alleged that the officers violated his First Amendment right to freedom of expression. The district court had jurisdiction over Petitioner's claim by virtue of 28 U.S.C. §§ 1331 and 1343.

The officers moved for summary judgment, claiming qualified immunity. The District Court granted their motion (App. 9). Petitioner appealed to the United States Court of Appeals for the Third Circuit (App. 2, 3). The Third Circuit affirmed (App. 8).

REASONS FOR GRANTING THE PETITION

A. Basing Qualified Immunity Upon a State Statute Despite Overwhelming Indicia of Its Unconstitutionality Unacceptably Enlarges the Scope of That Doctrine

Under reasoning used by the Third Circuit, if a State statute purported to authorize segregated lunch counters, an officer making an arrest pursuant to such statute would enjoy qualified immunity. This qualified immunity would remain available until such time as a prior civil case declared that specific statute unconstitutional. This qualified immunity would obtain notwithstanding the fact that this Court declared an equivalent statute unconstitutional in the context of criminal prosecutions.

First Amendment principles need the same protections afforded other bedrock principles. A State statute that licenses police officers to violate First Amendment principles with impunity constitutes a retreat from constitutional fundamentals established more than two centuries ago, *Marbury v. Madison*, 5 U.S. 137, 163 (1803):

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

The extent to which an unconstitutional State statute may confer qualified immunity presents an important question that has not been but should be addressed by this Court.

B. The Third Circuit's Decision Inflicts a Deep Wound Upon the First Amendment

Throughout history, people have been punished for expressing unpopular thoughts. Or for expressing popular thoughts in unpopular manners. While punishment in such circumstances will never be eliminated, the First Amendment at least seeks to minimize its occurrence. Only through such minimization can people feel reasonably secure in voicing opinions. When government does violate First Amendment rights, therefore, it is essential that courts provide remedies. This need is greatest when, as here, expression touches upon matters of public concern.

Newspapers reported that Respondents violated Petitioner's First Amendment right to express himself, and that the courts denied relief[1]. Such knowledge can only chill future exercise of free speech. When lower courts refuse redress, fundamental rights quickly wither.

C. The Case Below Was Wrongly Decided

This Court does not sit to correct errors of lower courts. Justice Stevens observed, however, "As the Court of last resort in the federal system, we have supervisory authority

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[1] The Associated Press, as well as local print and broadcast media, carried this decision. See Associated Press, *3rd Circuit: Man arrested for racist slur can't sue police*, http://www.firstamendmentcenter.org/news.aspx?id=15114 (as visited July 9, 2005).

and therefore must occasionally perform a pure error-correcting function in federal litigation," *Florida v. Rodriguez*, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting). This is one such occasion.

In purporting to follow *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Third Circuit lost sight of its caveat concerning law that is, in fact, clearly defined, *Id.*, at 819: "Where an official could be expected to know that certain conduct would violate constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action."

Precedent from multiple sources clearly defined the applicable law. Indeed, it is difficult to envision what more could have been done to place any reasonable officer on notice that Petitioner's painting was constitutionally protected.

1. Numerous Decisions of This Court Belie the Third Circuit's Holding That Applicable First Amendment Principles Were Less Than Clearly Defined

The Third Circuit held (App. 5):

> [I]t was reasonable for the officers, with the language of the statute [N.J.S. 2C:33-4d] as a guide, to believe that their arrest of Schlaflin would not violate any clearly established right, given the fact that New Jersey had an existing statute which appeared to authorize such an arrest. The fact that the statute was later found to be unconstitutional does not change this conclusion.

The Third Circuit cited *Blackhawk v. Commonwealth of Pennsylvania*, 381 F.3d 202 (3rd Cir., 2004). The language from *Blackhawk* that the Third Circuit declared controlling was (App. 6), "[I]n this case, the governing precedents were complex and developing. Although we now hold that the waiver procedure . . . is sufficiently open-ended to constitute a system of individual exemptions, a reasonable officer in the position of defendants could have concluded otherwise."

Blackhawk was irrelevant. Unlike *Blackhawk*, the governing precedents in the instant matter were neither complex nor developing. Petitioner's painting did not require that the officers predict future law. It required only that they follow established bedrock principles[2].

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), clearly defined these principles. *R.A.V.* involved a juvenile who allegedly burned a cross inside the fenced yard of a family whose members were black. This Court held that the First Amendment prohibited prosecuting persons solely on account of the content of their utterances. "The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content." *Id.*, 505 U.S. at 392.

R.A.V. was far from alone in placing the officers on notice concerning fundamental First Amendment rights. Three years after its *R.A.V.* decision, this Court characterized as axiomatic the right that the Third Circuit found (App. 6) "complex and

[2] The irrelevancy of *Blackhawk* may also be inferred from the fact that not one Respondent ever cited it. Quite the contrary, three officers, in their pleading, averred, "These defendants were acting in accordance with clearly established standards." And at oral argument, the Third Circuit gave not the slightest hint that *Blackhawk*-type ambiguity might exist.

developing." *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828 (1995) held, "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."

Texas v. Johnson, 491 U.S. 397, 414 (1989), expressed the same principle in different words: "If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." And *Cohen v. California*, 403 U.S. 15, 18, 19 (1971) (emphasis added), addressed messages presented in an offensive manner:

> The conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public.
>
> **Appellant's conviction**, then, rests squarely upon his exercise of the 'freedom of speec protected from arbitrary governmental interference by the Constitution and **can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys.**

Police Department of the City of Chicago v. Mosley, 408 U.S. 92, 95 (1972) taught: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Accord, *Virginia v. Black*, 538 U.S. 343 (2003).

2. Five Other Courts of Appeals, and the Third Circuit Itself, Had Clearly Defined the Applicable Principles

The Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have all decided claims of qualified immunity by government officials who punished individuals for protected speech. Each of those circuits found the right in question clearly established.

Grady v. El Paso Community College, 979 F.2d 1111, 1114 (5th Cir., 1992) noted, "The First Amendment protections of state employees who speak on matters of public concern are clearly established. Moreover, a reasonable official would have recognized that speech regarding the Persian Gulf war constituted a matter of public concern."

Barrett v. Harrington, 130 F.3d 246, 264 (6th Cir., 1997), held: "[I]t is well-established that a public official's retaliation against an individual exercising his or her First Amendment rights is a violation of § 1983."

Further acknowledging previously defined First Amendment rights was *Eberhardt v. O'Malley*, 17 F.3d 1023, 1028 (7th Cir., 1994), involving an assistant prosecutor fired for writing a novel. *Eberhardt* had no difficulty concluding, at 1028: "This is such an elementary violation of the First Amendment that the absence of a reported case with similar facts demonstrates nothing more than widespread compliance with well-recognized constitutional principles."

Burnham v. Ianni, 119 F.3d 668, 674, 675 (8th Cir., 1997), repeatedly citing *R.A.V.*, observed (citations omitted), "The First Amendment protection even extends to indecent

speech. It also extends to speech unprotected on one basis (e.g. obscenity) but protected on another (e.g. content in opposition to governmental acts). Clearly then, plaintiffs' speech is worthy of constitutional protection."

Cannon v. City and County of Denver, 998 F.2d 867 (10th Cir., 1993), citing *Mosley, supra*, held likewise.

Finally, the Third Circuit itself previously spoke to this exact issue, *Saxe v. State College Area School District*, 240 F.3d 200, 206 (3rd Cir., 2001) (internal citation omitted):

> But there is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs. When laws against harassment attempt to regulate oral or written expression on such topics, however detestable the views may be, we cannot turn a blind eye to the First Amendment implications.

3. Decisions by Numerous State Courts of Last Resort Clearly Defined the Applicable Law

The highest courts of numerous States have considered issues identical to those presented below. In every case, their holdings clash with the opinion of the Third Circuit.

State v. Ramsey, 311 S. Ct. 555, 430 S.E.2d 511 (1993), involved a cross burning. The Supreme Court of South Carolina held, "The First Amendment ensures that persons may speak as they think on matters vital to them, and that noxious doctrines may be refuted and their evil averted by

courageous exercise of the right of free discussion." *Id.*, 311 S. Ct. at 559, 430 S.E.2d at 514.

State v. Sheldon, 332 Md. 45, 629 A.2d 753 (1993), likewise involved a cross burning. The trial court granted the defendant's motion to dismiss the indictment. The Maryland Court of Appeals granted direct review, bypassing Maryland's intermediate appellate court. Affirming, it cited *R.A.V.* and held that limitations upon speech and expression must be content-neutral.

In re Douglas D, 243 Wis.2d 204, 626 N.W.2d 725 (2001), arose out of a juvenile's school assignment in creative writing. His essay described his teacher's head being cut off. Reversing the juvenile's adjudication as a delinquent, the Supreme Court of Wisconsin, also citing *R.A.V.*, held that that writing was entitled to First Amendment protection.

State v. Talley, 122 Wash.2d 192, 858 P.2d 217 (1993), addressed Washington's hate crime statute. Wash.Rev.Code 9A.36.080(2)(b) proscribed defacement of the property of the victim or a third person with symbols or words that historically or traditionally connoted hatred or threats toward the victim. The Supreme Court of Washington struck the statute, declaring that it "clearly regulates protected symbolic speech."

On similar principles, *Village of Skokie v. National Socialist Party of America*, 69 Ill.2d 605, 373 N.E.2d 21 (1978), denied an application to enjoin a public march of persons in uniforms bearing swastikas and carrying signs such as, "Free Speech for White America."

4. New Jersey's Highest Court and the New Jersey Legislature Have Both Acknowledged the Constitutionally Protected Nature of Acts Such as Those for Which the Officers Arrested Petitioner

State v. Vawter, 136 N.J. 56, 642 A.2d 349 (1994), considered the validity of a New Jersey hate crimes statute. A person or persons spray-painted a Nazi swastika and "Hitler Rules" on a synagogue. The same person or persons spray-painted a satanic pentagram on the driveway of a Roman Catholic church.

Defendants were indicted. The statute under which they were charged was N.J.S. 2C:33-10[3]. It prohibited written expressions of violence, contempt, or hatred predicated upon race, color, creed, or religion. Citing *R.A.V.*, the defendants sought dismissal of the counts that alleged violation of that statute. The trial court denied their application. On direct certification, the New Jersey Supreme Court reversed, *Vawter*, *supra*, 136 N.J. at 70, 642 A.2d at 357: "Although we are frank to confess that our reasoning in [*R.A.V.*] would have differed from Justice Scalia's, we recognize our inflexible obligation to review the constitutionality of our own statutes using his premises."

The New Jersey Supreme Court's acknowledgment of the protected nature of expression such as Petitioner's is especially significant because it came from the highest State court where the incident occurred. Such acknowledgment, even with no precedent from this Court, clearly defines

[3] N.J.S. 2C:33-10 is not the statute under which Petitioner was charged.

applicable law, *Robinson v. Bibb*, 840 F.2d 349, 353 (6th Cir., 1988). *See* Richard B. Saphire, *Qualified Immunity in Section 1983 Cases and the Role of State Decisional Law*, 35 Ariz.L.Rev. 621 (1983).

In response to *Vawter*, the Legislature amended N.J.S. 2C:33-10, Act of August 14, 1995, 1995 N.J.Laws, ch. 211, § 4. The amendment reduced the reach of the statute to exclude private property belonging to the actor. Further, the amendment excised that portion of the statute that criminalized expression on the basis of race, color, creed, or religion. Thus, six years earlier, the New Jersey Legislature repealed as unconstitutional provisions of a different statute that proscribed the precise behavior for which the officers arrested Petitioner.

Contrary to the Third Circuit's assertion, New Jersey never declared N.J.S. 2C:33-4d unconstitutional. It had no need to. State court decisions consistently gave N.J.S. 2C:33-4d a limiting construction. For example, *State v. L.C.*, 283 N.J. Super. 441, 450, 662 A.2d 577, 581 (App. Div., 1995), *certif. den.*, 143 N.J. 325, 670 A.2d 1066 (1996), observed, "We have also held that N.J.S.A. 2C:33-4 does not proscribe mere speech, use of language, or other forms of expression." And *State v. Hoffman*, 149 N.J. 564, 576, 695 A.2d 236, 242 (1997) held, "The purpose to be served by enactment of the harassment statute is to make criminal, private annoyances that are not entitled to constitutional protection." As so construed, N.J.S. 2C:33-4d was completely consistent with First Amendment decisions of this Court.

N.J.S. 2C:33-4d was indeed repealed. But its repeal merely accommodated simultaneous enactment of a different statute, N.J.S. 2C:16-1, of like substance, Act of January 11, 2002, 2001 N.J. Laws, ch. 443.

D. Public Officials, Civil Rights Plaintiffs, and the Courts Need Guidance Regarding the Extent to Which Principles Defined in a Criminal Case Become Clearly Defined for Qualified Immunity Purposes

This Court's concern in *R.A.V.* was whether particular acts could constitutionally be designated criminal. The Third Circuit's concern in the instant matter was whether a reasonable police officer should have been aware of principles established in prior cases such as *R.A.V.* The interrelationship between the two concerns is obvious. It is precisely this interrelationship that gives rise to Question Two.

Presumably, pronouncement of principles in a criminal case will, under some circumstances, give rise to clearly defined law for § 1983 purposes. But when? Petitioner suggests "always." Public officials would obviously disagree. The answer, whatever it may be, will greatly facilitate analysis of public officials' claims of qualified immunity.

E. Neither the Repeal of the Statute Under Which the Officers Arrested Petitioner Nor the Third Circuit's Designation of its Opinion as Non-Precedential Diminish the Need for Certiorari

The statutory section upon which the Third Circuit purported to rely in finding qualified immunity was repealed. That repeal diminishes not one iota the need for certiorari. As explained above, the statutory provision under which Petitioner was arrested still exists. It has simply been redesignated N.J.S. 2C:16-1a(1). The statute that the New Jersey Legislature amended subsequent to *State v. Vawter*, N.J.S. 2C:33-10, coexists with N.J.S. 2C:16-1a.

Moreover, risk of repetition endures on account of the court's designation of its opinion as non-precedential. Given the existence of a new substantively equivalent statute and the absence of a precedential limitation by the Third Circuit, misuse of qualified immunity remains available to shield future First Amendment violations.

CONCLUSION

Important questions concerning qualified immunity and erosion of cherished First Amendment principles justify review by this Court. This Court should grant certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED APRIL 12, 2005

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04-3019

PAUL J. SCHLAFLIN,

Appellant,

v.

RICHARD BOROWSKY; JAY F. FOX; PHILLIP CAMPO; STEVE MENNONA; GEORGE TRAMPLER; ROBERT C. HOLMES; TOWNSHIP OF MARLBORO

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 03-cv-04184
District Judge: Honorable Anne E. Thompson

Argued March 9, 2005

Before: NYGAARD, McKEE and RENDELL, *Circuit Judges.*

(Filed: April 12, 2005)

OPINION OF THE COURT

Appendix A

RENDELL, *Circuit Judge.*

I. Factual and Procedural Background

Paul Schlaflin appeals the order of the District Court granting summary judgment for Appellee Officers based upon qualified immunity. As we write only for the parties, we include only such factual and procedural events as are necessary to our decision. On September 11, 2001, Appellant, Schlaflin, painted the words "Death to the Sand Niggers" on his truck. He then drove his truck from his home in Morganville, New Jersey, into Marlboro, New Jersey, where he left the truck in the parking lot of a bar. Police received a call from Ms. Rabig, who had seen the truck in the parking lot, reporting that the truck had the words on it. (App.65a) The officers then went to the scene. Officer Borowsky arrived first, followed by Officers Campo, Mennona, Trampler and Chief Holmes. At some point, Detective Fox was called in because he specialized in investigating bias crimes. When Fox saw the truck, he ordered that Schlaflin be arrested. He also ordered that the words on the truck be covered and the truck towed to the police station.

Schlaflin was arrested and transported to police headquarters, where he was placed in a cell. He was charged with bias harassment under N.J.S. 2C:33- 4d (since repealed). Police towed and impounded the truck, which they kept for approximately two and one-half months. As a condition of his release, Fox required Schlaflin to remove the lettering from the truck.

Charges were brought against Schlaflin, but he was subsequently found not guilty, based on the conclusion that the

words on his truck constituted protected speech under the First Amendment. Schlaflin then brought suit against the officers, alleging violation of his freedom of speech, arrest without probable cause, false imprisonment, the seizure and impoundment of his truck, and civil conspiracy. The officers moved for summary judgment on the basis of qualified immunity, and this motion was granted. Schlaflin now appeals.[1]

II. Jurisdiction and Standard of Review

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

We have plenary review of the District Court's decision to grant summary judgment. *See Blair v. Scott Specialty Gases*, 283 F.3d 595, 602-03 (3d Cir. 2002). We apply the same standard as used by the District Court. *Id.*

III. Discussion

The inquiry into whether qualified immunity is proper was laid out by the Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), where the Court stated that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of

1. As the analysis of whether the officers were entitled to qualified immunity flows primarily from evaluation of his First Amendment claims and because Schlaflin does not thoroughly raise or discuss any other constitutional violations in his brief, we focus our decision primarily on the alleged First Amendment deprivation.

which a reasonable person would have known." The Court later expanded the explanation of the inquiry into whether the law was clearly established in *Saucier v. Katz*, 533 U.S. 194, 202 (2001):

> [T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." (quotations omitted).

The first question we must answer, therefore, is whether the officer's actions violated a clearly established right belonging to Schlaflin. The District Court found that Schlaflin's speech was not protected by the First Amendment under the standard set forth in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The Court in *Brandenburg* stated that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. Although we find that this is a close case, we ultimately conclude that the speech at issue here was protected because there was no threat of *imminent* unlawful action. The fact that the sole complaint about the truck came from Ms. Rabig, who had not witnessed any threat of violence or unruliness caused by the speech, bolsters this conclusion.

The next inquiry we must undertake is whether, despite the fact that we find that officers did violate Schlaflin's First Amendment rights here, they were unreasonable in doing so. We hold that they were not.

As stated above, the officers arrested Schlaflin for bias harassment pursuant to N.J.S. 2C:33-4d (subsequently repealed). At the time of this action, that statute stated:

> Except as provided in subsection (d), a person commits a petty disorderly persons offense if, with purpose to harass another, he:
>
> (a) Makes or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively course language, or in any other manner likely to cause annoyance or alarm.
>
> (d) A person commits a crime of fourth degree if in committing an offense under this section, he acted, at least in part, with ill will, hatred or bias toward, and with a purpose to intimidate, an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity.

In this case, it was reasonable for the officers, with the language of the statute as a guide, to believe that their arrest of Schlaflin would not violate any clearly established right, given the fact that New Jersey had an existing statute which appeared to authorize such an arrest. The fact that the statute was later found to be unconstitutional does not change this

conclusion. For example, in *Blackhawk v. Commonwealth of Pennsylvania*, 381 F.3d 202 (3d Cir. 2004), we had to decide whether individual officers of the Pennsylvania Game Commission were entitled to qualified immunity for their refusal to grant the plaintiff a waiver of a permit fee for keeping a wild animal when the plaintiff claimed that his reason for keeping the animal was religious. Subsequent to the Commission's refusal to grant the exemption, the statute under which the Commission justified the refusal was held unconstitutional. Regardless, we held that the defendants were entitled to qualified immunity because "in this case, the governing precedents were complex and developing. Although we now hold that the waiver procedure . . . is sufficiently open-ended to constitute a system of individual exemptions, a reasonable officer in the position of defendants could have concluded otherwise." *Id.* at 215.

Under the same logic, we hold that it was reasonable for the officers in the present case to conclude that the N.J.S. 2C:33-4d provided an adequate basis for believing the arrest of Schlaflin was not in violation of his First Amendment rights. Thus, because we find that it would not have been clear to a reasonable officer in the defendants' position that their conduct violated a clearly established right, we hold that the officers were entitled to qualified immunity in this case. Therefore, we will affirm the order of the District Court.[2]

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2. Judge McKee agrees that the District Court did not err in granting summary judgment based upon qualified immunity under *Saucier* even if defendants violated plaintiff's First Amendment rights. However, Judge McKee is dubitante on the question of whether any such First Amendment violation occurred given the totality of circumstances here. Accordingly, he would not reach that question.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED APRIL 12, 2005

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04-3019

PAUL J. SCHLAFLIN,

Appellant

v.

RICHARD BOROWSKY; JAY F. FOX; PHILLIP CAMPO; STEVE MENNONA; GEORGE TRAMPLER; ROBERT C. HOLMES; TOWNSHIP OF MARLBORO

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 03-cv-04184)
District Judge: Honorable Anne E. Thompson

Argued March 9, 2005

Before: NYGAARD, McKEE
and RENDELL, *Circuit Judges*.

Appendix B

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued on March 9, 2005. On consideration whereof, it is now here

ORDERED and ADJUDGED by this Court that the Order of the District Court entered on June 8, 2004, be and the same is hereby AFFIRMED. All of the above in accordance with the opinion of this Court. Costs taxed against the Appellant.

ATTEST:

s/ Kathleen Brouwer
Acting Clerk

Dated: April 12, 2005

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED JUNE 7, 2004

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 03-4184 (AET)

PAUL J. SCHLAFLIN,

Plaintiff,

v.

RICHARD BOROWSKY, et al.,

Defendants.

MEMORANDUM & ORDER

This matter comes before the Court on Defendants' motions for summary judgment on the basis of qualified immunity. The Court has reviewed the written submissions of the parties and heard oral argument on June 7, 2004. For the foregoing reasons, the Court will grant Defendants' motions.

Under *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would

have known." In determining whether qualified immunity applies in a specific case, a court must "first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all." *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (quoting *Conn v. Gabbert*, 526 U.S. 286, 290 (1999)). If a plaintiff satisfies this first prong, the court must next determine whether the right is clearly established by inquiring "whether it would be clear to a reasonable [government official] that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

In the present case, Plaintiff satisfies the first prong of the analysis, but fails at the second. The application of N.J. Stat. Ann. 2C:33-4d to Plaintiff's conduct and a determination that the arrest did not run afoul of the First Amendment as Plaintiff's message was likely to incite or produce "imminent lawless action" as articulated in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam), was not objectively unreasonable under the facts and circumstances of this case.

For the foregoing reasons, it is on this 7th day of June, 2004,

ORDERED that Defendants' motions for summary judgment on the basis of qualified immunity [11-1], [12-1], [13-1] are GRANTED, and it is further

ORDERED that Plaintiff's cross-motion for summary judgment [14-1] is DENIED, and it is further

Appendix C

ORDERED that this case is CLOSED.

s/ Anne E. Thompson
ANNE E. THOMPSON, U.S.D.J.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED MAY 23, 2005

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No.04-3019

PAUL J. SCHLAFLIN,

Appellant,

v.

RICHARD BOROWSKY; JAY F. FOX;
PHILLIP CAMPO; STEVE MENNONA;
GEORGE TRAMPLER; ROBERT C. HOLMES;
TOWNSHIP OF MARLBORO

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 03-cv-04184)
District Judge: Honorable Anne E. Thompson

Present: SCIRICA, *Chief Judge*,
SLOVITER, NYGAARD,
ALITO, ROTH, McKEE, RENDELL, BARRY,
AMBRO, FUENTES, SMITH, FISHER,
and VAN ANTWERPEN, *Circuit Judges*

Appendix D

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by Appellant having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is hereby DENIED.

BY THE COURT:

/s/ Marjorie O. Rendell
Circuit Judge

Dated: May 23, 2005